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U.S. District Court

Eastern District of Michigan

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Case Number: 2:10-cv-13101-BAF-RSW
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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-and-

SIERRA CLUB,

Plaintiff-Intervenor,

-v-

Case Number: 10-13101

DTE ENERGY COMPANY, and
DETROIT EDISON COMPANY,

Defendants,

_____ /

TELEPHONIC CONFERENCE
BEFORE THE HONORABLE BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE
100 U. S. Courthouse & Federal Building
231 West Lafayette Boulevard West
Detroit, Michigan 48226
TUESDAY, MAY 13TH, 2014

APPEARANCES:

For the Plaintiff:	Thomas A. Benson, Esq. Kristin M. Furrie, Esq.
For Plaintiff-Intervenor:	Mary M. Whittle, Esq. Nicholas J. Schroeck, Esq.
For the Defendants:	F. William Brownell, Esq.

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1 Detroit, Michigan
2 Thursday, June 20th, 2013
3 (At or about 1:05 p.m.)

4 -- -- --

5 THE COURT: Let's start with the Government,
6 appearances, please, for the record.

7 MR. BENSON: Thank you, your Honor.

8 Tom Benson for the United States, Department of
9 Justice.

10 With me are Elias Quinn, James Lofton. We also
11 have Shannon Fisk representing the Sierra Club, plaintiff
12 intervenor.

13 MR. BROWNELL: Your Honor, William Brownell on
14 behalf of Detroit Edison.

15 With me are Mark Bierbower, Matt Lund, Randy
16 Rutkofske, from Detroit Edison and Mike Solo from Detroit
17 Edison.

18 THE COURT: Great. The part that I think we should
19 put on the record is that Detroit Edison in their
20 submission to the Court has requested an opportunity to
21 file a motion for summary judgment prior to the
22 commencement of any additional discovery.

23 Is that basically what you're asking?

24 MR. BROWNELL: That's correct, your Honor. We
25 believe the case would be advanced if we could schedule

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1 summary judgment briefing based on a narrow remand from the
2 Sixth Circuit.

3 THE COURT: And based upon the record as it exists
4 today?

5 MR. BROWNELL: That's correct, your Honor.

6 THE COURT: Including discovery?

7 MR. BROWNELL: That's correct, your Honor.

8 THE COURT: What's the Government's position?

9 MR. BENSON: Yes, your Honor.

10 I think our position is that it makes sense to
11 sort of take stock of where we are and just so -- sort of
12 everything is out in the open right now, we are
13 anticipating that we're going to move to amend the
14 complaint. We're going to add some amount of claims. We
15 have to go through the process internally and that's not
16 complete yet. It takes a little bit of time. But we think
17 before going ahead on briefing anything, briefing a
18 particular claim, it makes sense to get the full suite of
19 claims out. And we think some of the facts involved in
20 those new claims will be relevant to the motion that
21 Detroit Edison is looking to file.

22 THE COURT: Detroit Edison has anticipated that in
23 their submission and their position -- why don't you state
24 your position?

25 MR. BROWNELL: Your Honor, we think regardless of

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1 what happens with an amended complaint it's important to
2 schedule summary judgment briefing now because the Monroe 2
3 claim has been pending for some time now --

4 THE COURT: All you want to deal with is 2.

5 MR. BROWNELL: Right.

6 THE COURT: And you take exception to their adding
7 on others, and we'll deal with that later, but is that
8 basically what you're saying?

9 MR. BROWNELL: That's essentially it, but, your
10 Honor, we also believe that resolving the Monroe 2 claim
11 now will provide important additional clarification which
12 will help with other, resolving other claims to the extent
13 the complaint was amended.

14 THE COURT: You know, the way I view it, and I'll
15 tell you -- first, how much time are you talking about in
16 order to submit your brief and your motion?

17 MR. BROWNELL: Your Honor, we've submitted our
18 brief along with the motion.

19 THE COURT: I'm sorry.

20 MR. BROWNELL: You have that so the scheduling
21 issue would be the Government's response.

22 THE COURT: My thought was that we might as well
23 do it. There's no downside to doing it. There's only an
24 upside and I don't know what the result will be. It's not
25 going to delay much anyhow. I will finish the scheduling

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1 order and allow some time for that. I think it makes sense
2 to do it that way.

3 So I'll allow you to file a motion. You'll
4 respond to it in due course, and we'll decide it fairly
5 quickly.

6 Any other issues that we have that should maybe
7 on the record?

8 MR. BENSON: Your Honor, if I could just suggest
9 one thing, and it sounds like you made up your mind.

10 THE COURT: I'm always open. I made up my mind
11 only as a practical matter. It's their motion, I'm only
12 doing what's practical.

13 MR. BENSON: No, I understand.

14 The one thing we would suggest is I do think
15 there are facts that are going to come out in light of the
16 additional claims that are going to be relevant to the
17 motion that's on the table. And basically what we -- one of
18 the things that's at issue here is has Detroit Edison
19 complied with the law, and that's to sort of -- to boil it
20 down a little bit.

21 THE COURT: To boil it down? That's it? If there's
22 nothing else --

23 MR. BENSON: I think what we're going to be able
24 to suggest once we have the new claims that there's a
25 pattern here and this is -- the claim we filed already the

1 Monroe 2 is one particular example of not complying with
2 the law. There are other examples that have different
3 factual predicates, but the pattern is the same that
4 Detroit Edison is going ahead without getting these permits
5 and sort of finding different ways to justify that. We
6 think they are all improper, but we'd like to be able to
7 sort of put out the whole spectrum before the Court before
8 you go ahead and make the decision.

9 THE COURT: But assuming that -- and, again, I
10 don't want to argue their case for them, but most cases I
11 don't know as well as I know this one, but assuming -- and,
12 again, we just talked about it lunch time on another case,
13 assume there is a pattern, is there law that -- again, I
14 don't know the answer to this, but if you use a pattern to
15 establish just because there is a pattern in this
16 particular case they violated?

17 MR. BENSON: No, I'm not quite saying that, your
18 Honor. I'm not saying that -- you know, let's say
19 hypothetically they've violated at Unit X that means they
20 also violated at Unit Y. But what I think it does show is
21 that to the extent Detroit Edison is saying, look, we have
22 a system for complying with the law and we applied it here.
23 I don't think that system holds. There are other examples
24 where they're essentially playing games with the
25 regulations that I think put in perspective what's going on

1 here.

2 THE COURT: But even if it's true, even if it's
3 true they have a pattern, this case is a stand alone case
4 though, isn't it? I mean I have to decide whether or not
5 there's a violation in this particular case. If they have a
6 pattern are you suggesting that then I would have to go
7 through -- if there's a pattern in their system, you still
8 have to show that there's a violation in each one of those;
9 wouldn't you? I mean, I don't know.

10 The reason I'm saying that is we just had a
11 little tutorial at lunch on forfeitures, civil and criminal
12 forfeitures and we talked about patterns. But their
13 patterns were important because there was law that said,
14 you know, you can use those to show criminal intent and so
15 forth. But you can only use them to a certain extent if
16 there was criminality. But here -- I don't know. You guys
17 know the law. Is there some law that says that I -- as to
18 number 2, that they had a pattern -- where's the violation?
19 I just don't get it. Maybe I'm wrong.

20 MR. BENSON: I guess I'm not saying that. I'm not
21 saying that sort of claim -- this forthcoming claim or
22 forth coming set of claims --

23 THE COURT: And I don't mean to argue the case
24 either --

25 MR. BENSON: No, that's fine.

1 THE COURT: This is just a case I know a lot
2 about.

3 MR. BENSON: And I don't want to suggest that
4 because there might be a violation on a forthcoming claim
5 that means there is a violation on this. But I do think
6 it's useful for the Court to see the practice which is what
7 Detroit Edison has put at issue here, their practice, and
8 whether it does comply with the law. I think looking at it
9 across a spectrum of projects is going to be useful.

10 I guess the other thing I would suggest is that
11 deciding the Monroe 2 issue now is not going to materially
12 advance the conclusion of this case in any way. We are --
13 you know, no matter what happens, we're going to go through
14 the process and we anticipate, you know, I can't say for
15 sure because I'm not the Attorney General, we anticipate
16 bringing additional claims. Those claims are going to stand
17 sort of no matter what happens here and so why go through
18 the summary judgment process twice? Why not get everything
19 on the table, look at it all, and make a decision at that
20 point. That's what we propose.

21 THE COURT: I understand.

22 MR. BROWNELL: Your Honor, we have a fundamental
23 disagreement with that, of course. The Government brought
24 the claim against Monroe 2 in order to test the law with
25 respect to the Monroe 2 compliance with the law in

1 particular Detroit Edison's program under the 2002 rules to
2 assess projects, to provide notice as required by law.

3 So to the extent that what Detroit Edison has
4 done is correct with respect to Monroe 2 that's going to
5 shed important light on resolution of any additional claims
6 that the Government might bring under those 2002 rules.

7 THE COURT: Their argument though is if you have a
8 pattern then that may be helpful in seeing -- again, I'm
9 not sure exactly why or why it wouldn't be helpful, but
10 that a pattern may add to something. Their other argument
11 is, of course, they have every intention and probably will
12 move to amend as to the others and, therefore, why not
13 handle all of them at the same time. Why should we
14 bifurcate this particular case?

15 MR. BROWNELL: Your Honor, it makes sense I think
16 because the Monroe 2 case is keyed up for decision, and it
17 raises issues as to the meaning and application of the 2002
18 rules. To the extent there is a pattern that will help
19 resolve any other cases that fit that pattern of compliance
20 or in the Government's view, non-compliance with the 2002
21 rules. It will resolve --

22 THE COURT: I think it makes sense as I say to at
23 least hear -- why don't you file a response and we'll get a
24 decision out fairly quickly because counsel has indicated
25 he's going to file a motion. The issues are fairly limited.

1 Then we can go from there.

2 Okay. Anything else we should put on the record?

3 MR. BENSON: This is a scheduling issue if I
4 could.

5 THE COURT: Oh, please. Let's put it all on the
6 record.

7 MR. BENSON: Okay. But as long as we're talking
8 about the motion, you know, and I'm not sure it's going to
9 be as simple as counsel has represented, but we'll see when
10 we get into it.

11 THE COURT: You can only have one question.
12 Go on.

13 MR. BENSON: But as far as scheduling our response
14 there had been some talks between the parties about having
15 about 30 days which --

16 THE COURT: Whatever you want. I'll give you 30
17 days.

18 MR. BENSON: If we could ask for August 3rd
19 because that sort of puts us beyond a couple of vacations
20 --

21 THE COURT: Absolutely. It's a very important
22 motion and I want to make sure both sides and if you need a
23 couple days it's not going to change anything.

24 August 3rd for your response?

25 MR. BENSON: Thank you, your Honor.

1 THE COURT: And reply, how much time?

2 MR. BROWNELL: I believe we have some schedules
3 with vacation in early August. If we could have until, say,
4 what is it, the 21st of August, or th 25th of August?

5 THE COURT: Tell me what you want.

6 MR. BROWNELL: The 23rd is a Friday, the 23rd of
7 August, your Honor.

8 THE COURT: That's perfect.

9 THE CLERK: August 3rd for the response by the
10 plaintiff and then August 23rd for the reply by the
11 defense.

12 THE COURT: Then we'll work on it and we'll get it
13 out in 30 days.

14 We probably won't have a hearing. This I'm really
15 familiar with it. For some reason after we read it and if
16 we need a hearing we'll let you know.

17 MR. BROWNELL: Your Honor, if I could just mention
18 a detail, August 3rd is a Saturday.

19 MR. BENSON: If we can have that Friday, the 2nd
20 is fine.

21 Can I raise one other scheduling issue, I
22 apologize.

23 THE COURT: We're doing all the scheduling right
24 now.

25 MR. BENSON: I just wanted to let the Court know

1 we are also sort of mulling over the possibility of a
2 cross-motion in response to the DTE motion. So if we want
3 to talk about having a date for whatever the reply would be
4 for that, we could do that now or --

5 THE COURT: If there's a cross-motion you'll file
6 it on the 3rd and we'll give them --

7 MR. BROWNELL: Thirty days, your Honor.

8 THE COURT: Thirty days.

9 THE CLERK: September 6th.

10 THE COURT: I'll give you the same amount of time
11 we gave them to reply.

12 THE CLERK: September 27th.

13 THE COURT: We'll do an order on that. Carol will
14 do an order.

15 If you do the cross-motion that will delay us a
16 little bit too because we won't get everything together.

17 What I'm trying to do is set the other dates
18 assuming that this does not -- let's use these dates.

19 But I think we have another issue that I think we
20 should talk about and that is if you're going to amend how
21 much time do you need to file a motion to amend?

22 MR. BENSON: Right, your Honor.

23 I mean, we would ask for, you know, probably a
24 couple months to the end of the summer, to the end of
25 August to be able to amend the complaint.

1 MR. FISK: We may also amend so we would ask for
2 the same amount of time.

3 MR. BENSON: And I was going to say that's part of
4 the timing, your Honor. I think if we can --

5 THE COURT: That's fine.

6 MR. BENSON: -- sort of decide among --

7 MR. BROWNELL: Your Honor, we don't have an
8 objection with respect to the timing of the motion to amend
9 but, of course, as far as a response to it, we'll have to
10 see the motion.

11 THE COURT: Yes. If they're going to amend, I want
12 to give them a date by which they have to file the motion
13 to amend. Then you will respond. That one I may have to
14 hear very frankly. From what I'm listening to here we may
15 have some oral argument on this one.

16 If they amend by that date then what we'll do is
17 use normal dates unless you guys want to brief something
18 else. But we'll use the normal dates for the response and
19 the reply. If you need more time and you guys can agree let
20 me know, send me a stip and an order or you could get me on
21 the phone. That particular motion probably you can do it in
22 the time period, the normal time period. I think it's
23 pretty straightforward.

24 MR. BROWNELL: Understood, your Honor.

25 THE CLERK: The deadline for the motion to amend

1 is September 6th, is that what it is? Do you want the end
2 of August or September?

3 THE COURT: He said the end of August.

4 MR. BENSON: September 6th is fine.

5 THE CLERK: September 6th.

6 THE COURT: It must be filed by that time. We'll
7 use our regular dates for briefing and so forth.

8 Now, I guess that gets us to the point where
9 probably we can't talk much -- about any more scheduling
10 which I intended to do today because, number one, it
11 depends on the motion for summary judgment to some extent
12 but even more it depends on the motion to amend because if
13 there's a motion to amend then we're going to have to talk
14 about a lot of things in terms of scheduling, in terms of
15 discovery and things of that nature.

16 I mean, we've accomplished a lot here today, but
17 I really can't accomplish that which I wanted to and that
18 was to firm up exactly what we're going to do.

19 MR. BROWNELL: I think that's correct, your Honor.
20 We'll have to come back.

21 THE COURT: I can't give you a trial date, I can't
22 give you any of those kind of dates until I know what's
23 happening here. That's why we'll probably hear your motion.
24 We'll probably have a hearing on your motion because at the
25 same time we'll do our scheduling. I don't know how else to

1 do it.

2 MR. BENSON: I agree, your Honor.

3 THE COURT: I hate to get you guys in from out of
4 town again. Any time you want to do a conference or by
5 phone or anything else just let me know; however, it's
6 always good to see everybody.

7 Anything else we should be talking about today?

8 Oh, one other thing, you had offered this to us
9 before, we'd like to go out and take a look if both sides
10 don't mind. We thought it might be helpful just to take a
11 look and get an idea. Maybe you can set it up.

12 MR. BROWNELL: Now that we have time, your Honor,
13 I think that makes sense, we'll work with the company and
14 the Government to get something set up.

15 THE COURT: I mean nothing fancy and I don't --
16 I'm not looking for anything to do with this case. I think
17 it's going to be helpful in terms of a tutorial just about
18 the unit. We're not going to be on the record or anything
19 else. I don't know anything about regulations or anything
20 else. I know a lot about it, but now we're all talking
21 about it would be nice to see it. But there won't be any
22 discussions about regulations or anything of that nature.
23 Just take a look at it, what's going on out there, period,
24 that's it. But absolutely no discussion about the case or
25 about regulations and I think it's come to life a little

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1 better now.

2 MR. BROWNELL: Understood, your Honor. Should we
3 work with your clerk on your schedule?

4 THE COURT: Maybe we can do it right now.

5 MR. BROWNELL: I think the company may need some
6 time to figure out what the schedule is at the plant.

7 THE COURT: We're more interested in just kind of
8 looking. We had the photos and things like that. Just to
9 see it in size. I just want to see what it looks like.

10 MR. BROWNELL: Your Honor, Mr. Rutkofske would
11 like to address --

12 MR. RUTKOSKE: I think that's a good idea. We
13 would be glad to do it. Do you want to give us a couple
14 dates?

15 THE CLERK: The week of July 29th. Late July or
16 the first week of August.

17 THE COURT: Late July would be good.

18 Tuesday, the 30th, 29th.

19 MR. BENSON: If I can make a suggestion --

20 THE COURT: Sure.

21 MR. BENSON: I don't know if the next week is
22 possible as well? That first week we'll be finishing up the
23 brief based on the schedules so I don't know if the next
24 week is possible.

25 THE COURT: You don't have to be here. You can

1 send an AUSA.

2 MR. BENSON: That's true. We won't all come.

3 THE COURT: You don't even have to come in town.
4 We're not going to do anything except take a look so you
5 can send somebody locally.

6 MR. BENSON: Right.

7 THE COURT: Whatever you want.

8 That would be the best week. If we start going
9 into August --

10 MR. RUTKOWSKI: The 29th or 30th we could probably
11 make it work.

12 THE COURT: Twenty-ninth or 30th would be the best
13 for me. We could probably do it other days but then I'd
14 have to switch things around on our docket. Those are the
15 two dates.

16 MR. RUTKOWSKI: We'll make that work.

17 THE COURT: We have a jury trial starting.

18 Twenty-ninth or 30th. Nothing fancy, not a long
19 thing, nothing, just give us the basics of the operations
20 so that we can visualize what we see -- what we read.

21 So why don't you guys talk. We can do it any time
22 either one of those days. Give us a time. Tell us where to
23 be. We're talking about, what, shouldn't take more than a
24 hour. I don't know. But --

25 MR. RUTKOWSKI: I think we have a standard tour

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1 that takes approximately a hour and a half.

2 THE COURT: Okay. Hour and a half. That's great.

3 You guys see when it suits the attorneys because
4 we have both of those days. In terms of timing, just tell
5 us when and where.

6 You guys talk. Don't worry --

7 MR. BENSON: We'll make it happen.

8 MR. BROWNELL: Okay, your Honor, we'll get a date
9 and time worked out with the Government.

10 THE COURT: Anything else we should be talking
11 about?

12 MR. BROWNELL: We don't have anything further,
13 your Honor.

14 THE COURT: Government?

15 MR. BENSON: Nothing further, your Honor.

16 THE COURT: Good to see you guys. It's always nice
17 to see you.

18 We will be awaiting your filings. I can't say
19 anxiously.

20 Enjoy your summer.

21 MR. BENSON: Thank you, your Honor.

22 MR. BROWNELL: Thank you, your Honor.

23 (Proceedings concluded, 1:30 p.m.)

24 -- --- --

25

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Detroit, Michigan 48226

July 10th, 2013

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